BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BERNICE M. KAYS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,051,695
PROSOCO, INC.	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal the November 9, 2010, preliminary hearing Order of Administrative Law Judge Brad E. Avery (ALJ). Claimant was found to have suffered an accidental injury which arose out of and in the course of her employment with respondent. Respondent's motion to terminate benefits was denied.

Claimant appeared by her attorney, Robert R. Lee. Respondent and its insurance carrier appeared by their attorney, Christopher J. McCurdy.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held September 2, 2010, with attachments; the transcript of Preliminary Hearing held on November 5, 2010; the transcript of the deposition of Ann Connor taken October 5, 2010; the transcript of the deposition of Houston Williams taken October 5, 2010; and the documents filed of record in this matter. By agreement of the parties, the transcript of the deposition of Bernice M. Kays (claimant) taken April 29, 2010, in Docket No. 1,049,493, will also be considered a part of the record.

ISSUES

Claimant alleges she injured her low back working for respondent on January 22, 2010, while lifting and handling containers of cleaning products. She also alleges she

immediately notified her supervisor, Houston Williams, of her injury and that she later notified respondent's human resources manager, Ann Connor.

In the November 9, 2010, Order, the ALJ found that claimant sustained an accident that arose out of and in the course of her employment with respondent. The ALJ also found claimant had provided respondent with timely notice of the accident. Consequently, the ALJ denied respondent's request to terminate claimant's workers compensation benefits that had been previously awarded. The ALJ held in pertinent part:

> Motion to terminate benefits denied. Claimant was able to provide specific details in her testimony at preliminary hearing and in her discovery deposition in Docket No. 1,049,493 about her injury to her back and subsequent notice to her supervisor.
>
> Claimant did suffer an accidental injury. Claimant's alleged accidental injury did arise out of and in the course of employment. Notice was given timely.[1]

Citing the testimonies of Houston Williams and Ann Connor, respondent disputes that claimant was injured at work and further disputes that claimant provided timely notice of the alleged accident. Conversely, claimant, in essence, maintains that Mr. Williams and Ms. Connor are not credible and, therefore, they should not be believed.

In short, the issues before the Board on this appeal are:

1. Did claimant injure her back at work on January 22, 2010, while lifting and handling containers of cleaning products?

2. If so, did claimant provide respondent with timely notice of the accident?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds the November 9, 2010, preliminary hearing Order should be affirmed.

Claimant worked for respondent, a chemical company, filling and labeling containers of cleaning products. The containers ranged from pints and quarts to 55-gallon drums. She described hurting her back on Friday, January 22, 2010, while lifting 5-gallon containers weighing approximately 60 pounds each.

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[1] P.H. Order, November 9, 2010.

At the preliminary hearing held September 2, 2010, claimant testified:

> A. I was working in the solvent area helping another woman. And I was – she was filling five-gallon pails of this real thick heavy stuff and I was pounding the lids on for them. And they were to go into an over-pack box and I was trying to pick them up. I did all the lids, there was 57 of them. And then I had to pick them up, try and get them in a box. And I have bad hands anyway.
>
> JUDGE AVERY: You are talking about picking up the cans that you were –
>
> A. They were plastic containers. I meant five gallons but they weighed about 60 pounds. Then I had to slip them into another box, what they called an over-pack box, to be packaged. And I couldn't hardly get them in there. And I was trying to hold them with my legs too, because my hands weren't strong enough, and I hurt my back.[2]

Claimant indicated she promptly told her immediate supervisor and plant manager, Houston Williams, that her hands and back were hurting from her work activities and that, due to her symptoms, she had to rest because she was having back pain.[3] Claimant also maintains that on Monday, January 25, 2010, Mr. Williams asked how she was doing, and she responded that her back was still sore but she wanted to give it some time.

Claimant explained she did not immediately request medical treatment as she wanted to see if her back symptoms would resolve. Moreover, claimant indicated she was reluctant to request medical treatment as respondent gave its employees extra vacation time every three months when there were no injuries during the period.

Claimant quit her job on Wednesday, January 26, 2010. After leaving respondent's employment, claimant performed limited housekeeping chores one day a week for her sister, who owns the Fish Hook Resort near Branson, Missouri.

Claimant has also initiated a workers compensation claim alleging bilateral upper extremity injuries. Dr. Edward J. Prostic examined claimant in March 2010 relative to that claim. Nevertheless, the doctor noted in a March 29, 2010, report that claimant had injured her low back since their last visit in October 2008 and that she was then taking Hydrocodone for her low back.

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[2] P.H. Trans. (Sept. 2, 2010) at 6-7.

[3] Ibid., at 7.

When testifying in September 2010, claimant stated she then had pain in both her lower and upper back, along with pain and numbness into her left leg and heel. She stated her leg symptoms began within days of the alleged incident at work.

Houston Williams, who has worked for respondent for 35 years, disputes that claimant notified him of her alleged low back injury. He testified that during claimant's tenure with respondent, claimant never told him that she had injured her back or that she had any back pain.[4] Furthermore, Mr. Williams testified that any reports of injury are immediately forwarded to the safety coordinator, Chris Lesser, and if he is not available, the information is passed to the company president, vice president or production manager.

Mr. Williams also disputes that claimant would have been handling or lifting the heavy containers that she attributes to her back injury. He initially stated that claimant would not have been allowed to perform that work due to her hand injuries. But he later indicated that he did not know if claimant had work restrictions in January 2010 that would have prevented her from being assigned the work she alleges caused her alleged low back injury.

Likewise, respondent's human resources manager, Ann Connor, testified that claimant never notified her of a low back injury or that the work was causing claimant's back to hurt. Ms. Connor acknowledged having a conversation with claimant after she quit but claimant indicated in that conversation she needed to file a claim for unemployment benefits, not workers compensation benefits. Ms. Connor's memory was called into question during her cross-examination at her deposition when she failed to recall that the attorney letter of May 24, 2010, referenced claimant's back. She had earlier denied knowing of any back injury claim.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

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[4] Williams Depo. at 5.

[5] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

The ALJ observed claimant testify but did not observe Mr. Williams and Ms. Connor testify, as their testimonies were presented by deposition. By implication, the ALJ determined claimant's testimony was credible as the ALJ determined claimant had injured herself at work and that she had provided respondent with timely notice of the accidental injury. The undersigned accepts the ALJ's analysis of the evidence and finds the preliminary hearing Order should be affirmed. Being in the enviable position of observing claimant testify, the ALJ was better able to assess claimant's credibility than that afforded by a cold review of the transcripts. In addition, portions of the testimonies from Mr. Williams and Ms. Connor demonstrated their memories of the events were somewhat deficient.

In summary, the preliminary hearing Order should be affirmed.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this is a review of a preliminary hearing Order and, therefore, it has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[10]

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[7] K.S.A. 2009 Supp. 44-501(a).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[9] K.S.A. 44-534a.

[10] K.S.A. 2009 Supp. 44-555c(k).

CONCLUSIONS

Claimant has proven, for preliminary hearing purposes, that she suffered an accidental injury or injuries to her back while working for respondent and that timely notice of those injuries was provided to respondent. The denial of respondent's motion to terminate benefits is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Brad E. Avery dated November 9, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2011.

HONORABLE GARY M. KORTE

c:
Robert R. Lee, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge